

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended	)	MB Docket No. 05- 311
By the Cable Television Consumer Protection and Competition Act of 1992	)	

**COMMENTS OF CINCINNATI BELL INC.**

Cincinnati Bell Inc. (together with its subsidiaries, “Cincinnati Bell”)<sup>1</sup> submits these comments in response to a number of questions and issues raised by the Commission in its November 18, 2005 Notice of Proposed Rulemaking.<sup>2</sup> As Cincinnati Bell indicated in its response to the Commission’s August 12, 2005 Notice of Inquiry, Cincinnati Bell currently intends to launch a competitive video offering over an updated digital subscriber line network.<sup>3</sup> Given Cincinnati Bell’s intentions, Cincinnati Bell takes this opportunity to share its comments with the Commission regarding the implementation of Section 621(a)(1) of the

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<sup>1</sup> Cincinnati Bell Inc., headquartered in Cincinnati, Ohio, provides a wide range of telecommunications products and services to residential and business customers in greater Cincinnati area, which includes portions of Southwestern Ohio, Northern Kentucky and Southeastern Indiana. Cincinnati Bell is parent to Cincinnati Bell Telephone Company LLC, an independent incumbent local exchange carrier; Cincinnati Bell Entertainment Inc., an information and programming services provider; and Cincinnati Bell Wireless LLC, a wireless services provider; as well as other subsidiaries engaged in the provision of communications services.

<sup>2</sup> See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (November 18, 2005) (“*NPRM*”).

<sup>3</sup> See Cincinnati Bell Inc.’s comments to the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, filed September 19, 2005 (“*Notice of Inquiry*”).

Communications Act of 1934 (“the Act”), as amended, and whether the franchising process unreasonably impedes the federal goals of enhanced cable competition and accelerated broadband deployment. CBT also provides comment on how the Commission might ameliorate the effects of the cable franchising process on competitive entry into the multichannel video programming distributor (“MVPD”) market, particularly by entities such as Cincinnati Bell that have existing broadband facilities in the public right-of-way.

### **Cincinnati Bell’s Planned Internet Protocol Video Offering**

Cincinnati Bell is excited about the opportunity to bring much needed competition to the video marketplace of greater Cincinnati. In the face of competition from incumbent cable companies in the voice market, Cincinnati Bell is eager to round out its service offerings to provide customers with complete bundles of voice, wireless, data, and video services. As indicated in its comments to the *Notice of Inquiry*,<sup>4</sup> Cincinnati Bell is preparing to launch an Internet Protocol (“IP”)-based video service (generally referred to as “IPTV”) offering to its residential subscriber base over an upgraded digital subscriber line (“DSL”) network.<sup>5</sup> As such, Cincinnati Bell is pursuing a fiber-to-the node (“FTTN”) strategy similar to that described by SBC Communications Inc. (now AT&T Inc.) with respect to its “Project Lightspeed.”<sup>6</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> While Cincinnati Bell initially plans to offer video services to its residential consumers only, Cincinnati Bell anticipates expanding the availability of the product to business consumers in the future.

<sup>6</sup> *Notice of Inquiry* at ¶ 55.

While Cincinnati Bell continues to investigate FTTN solutions available for the delivery of high-quality video content and to participate in lab trials of various solutions, Cincinnati Bell's ILEC subsidiary, Cincinnati Bell Telephone Company LLC ("CBT") continues to upgrade its existing DSL infrastructure. In addition to enhanced data capabilities, these upgrades will also provide Cincinnati Bell with the requisite bandwidth to support a full-scale, switched video product throughout its existing operating area. The programming itself, however, will be obtained and distributed by a separate subsidiary, Cincinnati Bell Entertainment Inc. ("CBE"). CBE, which is currently negotiating agreements with multiple programming providers, plans to offer hundreds of channels of programming and digital music, video on demand ("VOD"), personal video recorders ("PVRs"), an interactive programming guide ("IPG"), and high definition television ("HDTV"). Cincinnati Bell also intends to offer several additional features to its video subscribers upon the launch of the service including voicemail access as well as caller ID notification via the television. Cincinnati Bell will continue to provide customers with high-speed data services and voice services on an integrated basis over the same network.

Once the facility upgrades have been made and the specific technology solutions chosen, Cincinnati Bell will be capable of transmitting video and other programming to the nodes located throughout the network (and closer to the customer premises), which will be further distributed from the nodes to end-users over existing copper plant. By employing an IP platform for its proposed video

services, Cincinnati Bell believes that it will achieve sufficient bandwidth to deliver high-quality video services which are not only comparable to but superior to the services currently available from cable and satellite providers today.

### **Cincinnati Bell's Proposed IPTV Service is Not Subject to Title VI Franchising Requirements**

The franchising requirements of Title VI of the Act apply only to “cable operators,” which are persons or entities that provide “cable services” over “cable systems.”<sup>7</sup> As the Commission notes in the *NPRM*, Section 621 of the Title VI prohibits a cable operator from providing cable service in an area without first obtaining a cable franchise.<sup>8</sup>

While the Commission did not seek comment on regulatory classification of video programming provided over an ILEC's existing DSL infrastructure, Cincinnati Bell takes this opportunity to briefly explain why its proposed IPTV

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<sup>7</sup> Specifically, a “cable operator” is “any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.” 47 U.S.C. § 522(5).

A “cable service” is “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” *Id.* at § 522(6).

A “cable system” is “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system.” *Id.* at § 522(7).

<sup>8</sup> *NPRM* at ¶ 2; 47 U.S.C. § 541(b).

service offering over existing DSL facilities is not subject to the franchising requirements of Title VI.<sup>9</sup>

1. Cincinnati Bell's IPTV Service Will Not Use the Public Rights-of-Way

The Commission has determined, and the Supreme Court has affirmed, that use of public rights-of-way is a critical factor in classifying facilities as cable systems.<sup>10</sup> If a facility serves subscribers without using public rights-of-way, it is not a cable system.<sup>11</sup> The Commission has interpreted this exception to mean that service providers that lease access to existing facilities that use public rights-of-way do not themselves use such rights-of-way.<sup>12</sup> In other words, even if the underlying, leased facilities use public rights-of-way, the lessees of such facilities do not themselves use public rights-of-way. Consistent with this principle, the Commission tentatively has concluded that ISPs that access rights-of-ways through previously franchised systems are not themselves subject to local franchising

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<sup>9</sup> Cincinnati Bell does not suggest that other provisions of Title VI generally applicable to MVPD providers are not applicable to it as a provider of IPTV services.

<sup>10</sup> See, e.g., *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993) (affirming the Commission's conclusion that a satellite master antenna television ("SMATV") facility is subject to the cable franchise requirement under the Act only if the facility's transmission lines interconnect separately owned and managed buildings or if its lines use or cross any public right-of-way). Video programming distribution systems that use radio signals (e.g., satellite or multichannel multipoint distribution services ("MMDS")) or that are wholly within a single building or campus (e.g., SMATV systems) are not cable systems under the Act. See *Guidry Cablevision/Simul Vision Cable System v. City of Ballwin*, 11 F.3d 383, 386 (8<sup>th</sup> Cir. 1997) (upholding the Commission's determination that "use" of a public right-of-way does not include the transmission of electromagnetic radiation over such a right-of-way).

<sup>11</sup> 47 U.S.C. § 522(7).

<sup>12</sup> See, e.g., *Entertainment Connections Inc., Motion for Declaratory Ruling*, Memorandum Opinion and Order, 13 FCC Rcd 14277 at ¶ 62 (1998) (holding that a SMATV operator does not "use" a public right-of-way when it transmits signals over lines that are on a public right-of-way but that are owned and operated by a common carrier through a tariffed service), *aff'd sub nom. by City of Chicago v. FCC*, 199 F.3d 424, 432-3 (7<sup>th</sup> Cir. 1999).

authorities because they do not use public rights-of-way in such a way as to require additional franchising.<sup>13</sup>

As discussed above, CBE will lease capacity on the existing DSL facilities of CBT over which CBE will transmit video programming. Thus, Cincinnati Bell's IPTV service does not use public rights-of-way despite the fact that the underlying transmission facilities owned by CBT do occupy the public rights-of-way. CBT already has existing state "franchises" or the equivalent thereof to use public rights-of-way for the underlying network. The franchises, which were originally secured for telecommunications services, have also been used as the basis for deploying, maintaining, and upgrading Cincinnati Bell's DSL facilities. In short, IPTV is simply the provision of additional content over existing DSL facilities for which CBT already has permission to occupy the public rights-of-way. Therefore, IPTV service does not use public rights-of-way in the manner contemplated by Title VI of the Act and Cincinnati Bell is not operating a cable system.<sup>14</sup> Thus, Cincinnati Bell cannot be deemed a "cable operator" for purposes of Section 621 of Title VI.

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<sup>13</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶ 102 (2002) (tentatively reaching this conclusion with respect to cable modem service) ("*Cable Broadband Inquiry*").

<sup>14</sup> See *City of Austin v. Southwestern Bell Video Service, Inc.*, 193 F.3d 309 (5<sup>th</sup> Cir. 1999) (holding that under a similar arrangement where one affiliate distributed the video programming of another affiliate, the affiliate providing video programming was not a "cable operator" under the Act), *cert. denied*, 120 S.Ct. 1708 (2000).

## 2. IPTV Is Not a One-Way Transmission of Video Programming.

Beyond the fact that Cincinnati Bell's proposed IPTV service is excluded from the definition of "cable service" because it does not use the public right-of-way, the service is further excluded from the term based on its two-way characteristics and functionality. The IPTV service Cincinnati Bell intends to offer subscribers entails a switched, point-to-point transmission of video programming whereby video programming is stored on the network and delivered to a subscriber only when the subscriber selects a channel or program. Each time a subscriber selects a different channel or program, he or she electronically accesses new data off the server, in much the same way that he or she would access information over the Internet. In this way, each subscriber participates in a two-way dialogue with the network in order to select particular programming, which is then delivered to the individual subscriber. In contrast, incumbent cable service is a one-way, mass transmission whereby all video programming is simultaneously transmitted or broadcast to all subscribers. The subscriber selects a particular channel to view on the television from the totality of available programming resident in the subscriber's set-top equipment. The term "cable service" is specifically defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service...."<sup>15</sup> Further, the Commission recently clarified that "[t]he phrase 'one-way transmission' in the definition reflects the traditional view of cable as primarily a medium of mass communication, with the same package or packages of video

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<sup>15</sup> 47 U.S.C. § 522(6).

programming transmitted from the cable operator and available to all subscribers.”<sup>16</sup> Thus, IPTV, which involves two-way transmission of content, meets neither the statutory definition of “cable service” nor the Commission’s expressed understanding of that term.

Moreover, such two-way interaction with content is well beyond any “subscriber interaction” contemplated by the definition of “cable service.” The Commission has explained:

The legislative history [of the definition of cable service] states that Congress intended ‘simple menu-selection’ or searches of pre-sorted information from an index of keywords that would not activate a sorting program and ‘would not produce a subset of data individually tailored to the subscriber’s request’ to be cable services. On the other hand, offering the capacity to engage in transactions or off-premises data processing, including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers’ premises, would not be.<sup>17</sup>

The greater two-way capability inherent to IPTV will enable subscribers to activate sorting programs to produce subsets of data, individually tailored to subscriber requests, and to activate delivery software to initiate distribution of programming to subscriber premises equipment. Subscribers can engage in off-premises data processing and they have “the capacity to communicate instructions or commands to software programs stored in facilities” off of their premises.<sup>18</sup> IPTV, therefore,

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<sup>16</sup> *Cable Broadband Inquiry* at ¶ 61.

<sup>17</sup> *Id.* at ¶ 64 (citations omitted).

<sup>18</sup> *Id.*



offers a degree of subscriber interaction and a capacity for two-way transmission that places it well beyond the meaning of the term “cable service.”<sup>19</sup>

In sum, IPTV does not have two essential characteristics of a cable service – that “the cable operator be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally.”<sup>20</sup> To the contrary, “ultimate control of the experience lies with the subscriber,” who reaches out across CBT’s DSL network to interact with CBE’s video content in order to request specific content for delivery to his or her individual premises.<sup>21</sup> Therefore, because CBE does not provide “cable service” as defined by the Act, neither CBE nor CBT can a “cable operator” required to obtain a cable franchise pursuant to Title VI.

#### **Cincinnati Bell’s Ability to Obtain Franchises**

As previously indicated, Cincinnati Bell intends to launch IPTV throughout the Cincinnati metropolitan area over the upgraded DSL infrastructure of CBT. CBT’s DSL network is located throughout its local exchange area, which spans portions of three states—Southwestern Ohio, Northern Kentucky and Southeastern Indiana. CBT already has state authority to use public rights-of-way procured in connection with its telecommunications services. And, like many providers of DSL service, CBT relied on such existing franchises to deploy its DSL infrastructure.

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<sup>19</sup> *Id.* at ¶ 61-69. Such subscriber interaction also is not covered by the “or use” language added to the definition of “cable service” in 1996. The Commission has limited the scope of this term to address “only the use of content otherwise qualifying as cable service.” *Id.* at ¶ 65. Since IPTV is not a cable service, the “or use” language is inapplicable to IPTV.

<sup>20</sup> *Cable Broadband Inquiry* at ¶ 67.

<sup>21</sup> *Id.*

Cincinnati Bell contends that no additional franchising should be necessary for IPTV, which is simply additional IP-based content that will flow over CBT's DSL network.

Because Cincinnati Bell does not believe that its proposed IPTV service requires a cable franchise and, importantly, because it has not yet finalized its business plans, Cincinnati Bell has not engaged in discussions with local franchising authorities ("LFAs") to date. For this reason, Cincinnati Bell cannot comment on whether LFAs might demand concessions not relevant to franchises as requested.<sup>22</sup> If Cincinnati Bell were required to obtain separate franchises for the provision of IPTV throughout its operating area, however, Cincinnati Bell would have to negotiate agreements with more than fifty (50) LFAs in its limited three-state operating area. Cincinnati Bell contends that such a requirement would be unduly burdensome and wholly unnecessary to protect the public interest.

Cincinnati Bell's most significant objection to the franchise requirement is the almost certain condition that Cincinnati Bell build-out its network to provide service to all subscribers located in a LFA's jurisdiction. This objection is based on both practical and policy considerations. As indicated above, Cincinnati Bell is currently upgrading its existing DSL facilities to allow for both enhanced data services as well as video services to be delivered to most customers. However, as a practical matter, Cincinnati Bell's ability to provide video service to an individual customer will be based, foremost, on the location of its existing network. Cincinnati

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<sup>22</sup> *NPRM* at ¶ 13.

Bell may not be able to serve all of the customers in a given LFA's jurisdiction given the fact that Cincinnati Bell's network and the LFA's jurisdictional boundaries may not match. As the Commission has recognized, "areas served by [telephone and/or broadband service providers] frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFA."<sup>23</sup> There will undoubtedly be customers in a LFA's jurisdiction who are outside of Cincinnati Bell's traditional operating area and to whom Cincinnati Bell cannot provide service at all. Telephone providers like Cincinnati Bell should not be required to extend facilities beyond their existing operating area as a condition to providing IPTV service to any customer. Such a requirement will only serve to discourage Cincinnati Bell from making the investment necessary to bring video services to as many customers within its operating areas as it is economically feasible to do.

Secondly, Cincinnati Bell's ability to provide video service to a particular customer within a LFA's jurisdiction will be a function of the condition of the facilities serving that customer and the distance of the customer from the network node. Given technical limitations inherent in a DSL-based deployment, Cincinnati Bell may not be able to provide high-quality video service to certain customers (even though those customers can receive high-speed data services) without undertaking prohibitively costly upgrades to the system. As it does today, Cincinnati Bell should be able to make a decision about whether to make the network investments necessary to provide video service to a particular customer in its operating area on

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<sup>23</sup> *NPRM* at ¶ 23.

both operational and economic considerations rather than on a LFA's political boundaries.

Finally, even if LFAs themselves did not make inappropriate demands on Cincinnati Bell, the political process for securing a franchise agreement alone can take many months to accomplish. If Cincinnati Bell cannot obtain franchises prior to the planned launch of the service, Cincinnati Bell may have to delay its commercial launch in a particular portion or portions of its operating area entirely. Such a risk puts Cincinnati Bell in a very precarious position. If Cincinnati Bell makes the network investments necessary to bring video programming to a market (including installation of headend equipment, IT upgrades, content acquisition, network monitoring and support) but cannot obtain a franchise agreement(s) prior to the anticipated launch date, Cincinnati Bell's ability to make a return on its investments will also be delayed. Clearly, the risk posed by a delay or even denial of a franchise agreement serves as a barrier to Cincinnati Bell's entry into the competitive video marketplace.

In sum, from both a practical and policy perspective, Cincinnati Bell asserts that the franchise process, particularly build-out requirements imposed by LFAs, do create an unreasonable barrier to entry for facilities-based providers of telephone and/or broadband services.

**The Commission Should Preempt the Application Section 621(a)(1) to Entities That are Currently Authorized to Use the Public Rights-of-Way**

In accordance with the Commission's long recognized power to preempt state regulation that conflicts with the Commission's valid exercise of authority, the

Commission has the necessary authority to preempt the application of Section 621(a)(1) to IPTV services.<sup>24</sup> Specifically, the Supreme Court has recognized the Commission's authority to preempt state regulation that stands as an obstacle to the accomplishment and execution of the full objectives of Congress.<sup>25</sup> In the alternative, the Commission should use its authority to clarify that further state franchising is unnecessary for those entities that already have permission to access the public rights-of-way.

As explained above, Cincinnati Bell is not operating a cable system and IPTV is not a cable service. In the *Definition of Cable Television System Order*, the Commission explained that where a video content provider was not operating a cable system or providing cable service, the Commission has preempted state

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<sup>24</sup> See *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 375 (1986) (375 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) *cert. denied*, 434 U.S. 874 (1977) (upholding Commission preemption of state regulation because it was not possible to separate the interstate and intrastate components of the asserted Commission regulation)); see also *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (affirming Commission order preempting state and local entry regulation of satellite master antenna television); *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217; CC Docket Nos. 96-98, 88-57, First Report and Order and Further Notice of Proposed Rulemaking; Fifth Report and Order and Memorandum Opinion and Order; Fourth Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 22983, 23031-32, para. 107 (2000) (preempting state regulation of fixed wireless antennas as an impediment to the full achievement of important federal objectives).

<sup>25</sup> See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69.

franchising regulations.<sup>26</sup> In particular, the Commission noted that the exemption to the definition of “cable system” for facilities that do not use public rights-of-way “appears to be related mainly to Commission decisions and policies regarding its preemption of state regulation....”<sup>27</sup> Given that Cincinnati Bell’s proposed IPTV service does not use public rights-of-way and is not otherwise a cable service distributed over a cable system, the Commission should preempt state authority to regulate IPTV consistent with past precedent.

More recently, the Commission exercised this authority to clarify the applicability of state rules and regulations to IP-enabled services, such as voice-over-IP (“VoIP”), where the applicability of state laws to such services was unclear.<sup>28</sup> The Commission preempted the application of state telecommunications regulations to VoIP services provided by Vonage as well as other VoIP services sharing similar basic characteristics.<sup>29</sup> The Commission further stated the Commission would preclude state regulation of *any* IP-enabled service having those characteristics, “even video.”<sup>30</sup> Cincinnati Bell submits that IPTV does in fact share the characteristics which form the basis of the Commission’s decision: (1) IPTV will

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<sup>26</sup> See *Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, ¶¶ 20, 29 (explaining that the Commission has preempted state regulation for MDS and SMATV systems that were not cable services or cable systems) (the “*Definition of Cable Television System Order*”).

<sup>27</sup> *Id.* at note 17 (further noting that such prior decisions and policies were established in connection with SMATV and MATV facilities).

<sup>28</sup> See *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004) (“*Vonage Order*”); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004) (“*pulver.com Order*”).

<sup>29</sup> *Id.* at ¶ 1.

<sup>30</sup> *Id.* at ¶ 32.

require a broadband connection; (2) IPTV will require an IP-compatible set-top box; and (3) IPTV will involve a suite of integrated capabilities and features, including voice, data and video services, that enable subscribers to manage personal communications dynamically. Thus, under the precedent set forth in the Commission's order preempting state regulation of certain VoIP services, the Commission should preempt state regulation of video-over-IP or IPTV.

Moreover, the Commission's long-standing policy is to exempt information services and other interactive computer services from most regulation, including state regulation.<sup>31</sup> Based on this policy, the Commission recently determined that pulver.com's Free World Dial-up ("FWD") service was an information service and the Commission preempted state regulation of FWD.<sup>32</sup> Like FWD, IPTV is an information service, and state and local regulation of IPTV should be preempted pursuant to this long-standing policy.

IPTV is simply the provision of additional content over existing DSL broadband facilities, which are the same facilities and technology used to provide Internet access to Cincinnati Bell's Internet access subscribers. Like Internet access IPTV is an "information service."<sup>33</sup> IPTV makes available to subscribers a broad array of information regarding video content (e.g., content maturity ratings, program descriptions, actors, production year, etc.), allows subscribers to generate

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<sup>31</sup> *Vonage Order* at ¶ 21; *pulver.com Order* at ¶ 16.

<sup>32</sup> *pulver.com Order* at ¶ 1.

<sup>33</sup> The Act defines an information as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...." 47 U.S.C. § 153(20).

and acquire information regarding such content by performing keyword searches, and allows subscribers to use the service to store and retrieve information. IPTV processes subscriber requests regarding available content and stores information regarding subscriber preferences, including sorting and flagging of preferred content. Subscribers can also retrieve stored video programming from IPTV's video-on-demand library and request that programming be recorded through the PVR functionality.<sup>34</sup> IPTV is, therefore, an information service and state and local regulations should be inapplicable.

Preemption also is appropriate because IPTV has integrated interstate and intrastate components which effectively remove it from state and local jurisdiction. As explained in the *Vonage Order*, where a service has interstate and intrastate components that “preclude any practical identification of, and separation into, interstate and intrastate communications,” a dual federal/state regulatory regime is not possible, whether or not the service is an information service.<sup>35</sup> In such circumstances, the Commission will preempt state regulation especially where necessary “to avoid thwarting valid federal objectives for innovative new competitive services....”<sup>36</sup>

Preemption is also recommended from a policy perspective. It has long been acknowledged that a key premise for the cable franchise requirement is the

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<sup>34</sup> As noted above, scheduling, tracking and triggering the PVR functionality for IPTV is performed on the network, while the set-top box actually records the programming.

<sup>35</sup> *Vonage Order* at ¶ 14.

<sup>36</sup> *Id.* at ¶ 15.



management and use of the public rights-of-way. Because Cincinnati Bell's DSL infrastructure already occupies the public rights-of-way, Cincinnati Bell is subject to specific franchise requirements and/or numerous permitting requirements related to accessing the public rights-of-way. The fact that Cincinnati Bell is distributing a new type of data over its DSL network—video programming—does not change the fact that LFAs already have the tools necessary to manage the public right-of-way. To require further franchising for IPTV, which is indistinguishable from other IP-based content flowing over Cincinnati Bell's DSL network, defies reason. Moreover, there will be no greater burden on the public right-of-way, where the infrastructure—the DSL network—is already in place to provide video service to end-users.

The Commission should also reject the notion that LFAs need franchise agreements in order to ensure that they treat incumbent cable providers and new entrants evenhandedly. As the Commission is aware, local franchise requirements came about when cable providers were given a monopoly to provide cable service throughout a LFA jurisdiction. There is no reason to subject a new entrant to the video market (much less the third or fourth video provider in a market) to the legacy entry requirements imposed upon incumbent monopoly providers. Just as the Commission has concluded that VoIP providers should not be subject to state and local entry requirements, Cincinnati Bell encourages the Commission to find that video over IP should be free from such barriers to entry as well. Only by doing so can the Commission achieve the goal of lowering the barriers faced by new

entrants to a market so that customers will have a new competitive choice—IPTV—in the video market.

Finally, if the Commission does not preempt state franchising laws, it should at the very least clarify that additional franchises are unnecessary for IPTV. As already noted, CBT already has state franchise authority to use public rights-of-way procured in connection with its telecommunications services. CBT relied on such existing franchises to deploy its DSL infrastructure, as did many providers of DSL service. No additional franchising should be necessary for IPTV service, which is simply additional IP-based content that will flow over CBT's DSL network.

### **Conclusion**

As demonstrated herein, Cincinnati Bell will not operate a cable system and IPTV will not be a cable service. Cincinnati Bell therefore will not be a cable operator and Title VI and state franchising laws should not apply to IPTV provided over existing DSL facilities. To apply such regulations to IPTV over DSL would not only be inappropriate given the characteristics of the service, it would slow or potentially arrest deployment of this innovative new service. The Commission should use this opportunity to remove any uncertainty regarding whether Title VI franchising requirements apply to IP-enabled video service and whether any IP-enabled service is properly classified as a cable service under the Act.<sup>37</sup>

Cincinnati Bell respectfully requests that the Commission expeditiously find

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<sup>37</sup> In addition to this proceeding, the Commission has sought comment from the public regarding the application of Title VI to IP-enabled service in its IP-Enabled Services Proceeding. *IP-Enabled Services*, Notice of Proposed Rulemaking, FCC 04-28, ¶ 70 (rel. Mar. 10, 2004).

that IPTV service is not subject to regulation under Title VI or state franchising laws. In the alternative, Cincinnati Bell requests that the Commission clarify that Section 621(a)(1) is not applicable to facilities-based entities which currently have permission to occupy the public rights-of-way.

Respectfully submitted,

Cincinnati Bell Inc.

/s/ Ann Jouett Kinney

Christopher J. Wilson  
Ann Jouett Kinney  
201 East Fourth Street  
Room 102-890  
Cincinnati, Ohio 45202  
(513) 397-7260

Attorneys for Cincinnati Bell Inc.

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